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Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 15 2006

SRC 06 002 52551

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was approved by the Director, Texas Service Center, and is now before the Administrative Appeals Office on certification. The director's decision will be withdrawn in part and affirmed in part. The petition will be approved.

The petitioner's business is "Global Marketing, Distributing and Project Development in the Chemicals and Plastics Industry." It seeks to employ the beneficiary permanently in the United States as a finance manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary is a member of the professions and has the equivalent of an advanced degree.

The director properly advised the petitioner of its right to file a brief with this office pursuant to 8 C.F.R. § 103.4(a)(2). In response, counsel acknowledges receipt of the notice of certification and notes that the decision certified is an approval.

For the reasons discussed below, the director erred in combining the beneficiary's three-year undergraduate degree with experience while ignoring his actual Master's degree. Significantly, the director's approach would lead to a conclusion that the beneficiary does not meet the requirements of the job as set forth on the labor certification. Nevertheless, we concur with the director's ultimate conclusion that the beneficiary is eligible. Specifically, we find that while the beneficiary's three-year bachelor's degree is not a foreign equivalent degree to a U.S. bachelor's degree and, thus, may *not* be combined with any amount of experience to be considered equivalent to a U.S. Master's degree pursuant to 8 C.F.R. § 204.5(k)(2), the beneficiary is an advanced degree professional and meets the requirements of the labor certification based on his Master's degree.[2] Thus, while we withdraw the director's analysis, we affirm the approval of the petition.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

**Authority to Evaluate the Alien's Eligibility**

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.
[2] In reaching this conclusion, we are evaluating the Master's degree on its own; we are not combining multiple lesser degrees.

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

DOL has promulgated regulations expanding on these duties. 20 C.F.R. § 656. It is significant that none of the above inquiries assigned to DOL involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts, including the 9th Circuit that covers the jurisdiction for this matter.

> There is no doubt that the authority to make preference classification decisions rests with INS. **The language of section 204 cannot be read otherwise.** *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

In addition to evaluating whether the alien qualifies for the classification sought, CIS may also review whether the alien meets the job qualifications for the job as stated on the labor certification. Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and

> available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, reached a similar decision in *Black Const. Corp. v. INS,* 746 F.2d 503, 504 (1984).

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984).

**The Alien's Three-Year Bachelor's Degree and Experience**

The director's decision relies solely on the beneficiary's three-year bachelor's degree and experience. While the director asserts that the evaluation concluded that the beneficiary's three-year degree is equivalent to a U.S. bachelor's degree, the evaluation actually states that the three-year degree involved "similar requirements to the completion of three years of academic studies *leading to* a Bachelor of Business Administration Degree." (Emphasis added.) In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Because the beneficiary's bachelor's degree is not a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act by combining this degree with experience. As such, we withdraw the director's conclusion that the beneficiary's bachelor's degree, when combined with experience, is sufficient to demonstrate his eligibility as an advanced degree professional.

Moreover, the director's analysis would have adverse consequences for determining whether the alien meets the requirements of the job offer. The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

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|---|---|
| <u>Block 14:</u> | |
| Education: | Master's degree in Business Administration |
| Experience: | Six years in the job offered or the related occupation of international finance. |
| Block 15: | N/A |

To determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." Id. at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse-engineering of the labor certification.

As the labor certification specifically requires a Master's degree in Business Administration and does not explicitly allow for a substitution of the degree with a combination of a lesser degree and experience, the director's analysis, which concludes that the beneficiary is only an advanced degree professional by means of a bachelor's plus five years of progressive experience, would result in a determination that the beneficiary does not meet the job requirements on the labor certification.

In light of the above, we withdraw the director's analysis.

**The Beneficiary's Master Degree**

First the position described on the labor certification, financial manager, is a profession. The regulation at 8 C.F.R. § 204.5(k)(2) provides that a profession is an occupation where a U.S. bachelor's degree or its foreign equivalent is the minimum requirement for entry. The Occupational Outlook Handbook, available at www.bls.gov/oco, provides that a "bachelor's degree in finance, accounting, economics, or business administration is the minimum academic preparation for financial managers."

While we disagree with the director that the beneficiary's bachelor degree can be combined with experience to be considered the equivalent of an advanced degree, we note that the beneficiary in fact possesses a two-year Master of Commerce degree from the University of Udaipur, which the director inexplicably fails to address beyond acknowledging its existence. The evaluation of this degree concludes that the completion of this degree involved "similar requirements to the attainment of a Master of Business Administration Degree, with a concentration in Accounting, from an accredited institution of higher education in the United States."

We need not combine the beneficiary's undergraduate degree with experience or combine multiple degrees in this matter to conclude that the beneficiary is eligible for the classification sought and meets the requirements of the job offer. The beneficiary has a degree, the Master of Commerce degree, that is a foreign equivalent degree to a U.S. MBA, the degree required as stated on the labor certification. Thus, the beneficiary is an advanced degree professional and meets the requirements of the labor certification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has sustained that burden. Accordingly, while we withdraw the director's reasoning, the decision of the director approving the petition will be affirmed.

**ORDER:** The petition is approved.